

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

GREGORY BURGARD,

Plaintiff,

v.

CIV. NO. 03-924 MCA/ACT

BALLJEWELRY.COM. LLC, a Texas
limited liability company and
CAREN GRAY,

Defendants.

**MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED
DISPOSITION ON MOTION FOR ATTORNEY'S FEES**

THIS MATTER COMES before the Court on Plaintiff's Post-Judgment Motion for an order awarding attorney's fees. (Doc. No. 17). The District Court Judge entered an Order of Reference asking the Magistrate Judge assigned to this case to propose findings of fact and recommend an ultimate disposition of this motion. (Doc. No. 18).

The Magistrate Judge having reviewed the Motion, the attached exhibits in support of the Motion and the relevant case law, recommends the following as the Court's legal findings, findings of fact and ultimate disposition:

1. The Plaintiff is entitled to an award of attorney's fees in accordance with 35 U.S.C. §285 and in accordance with the discretionary authority of the Court, 28 U.S.C. §1927. The Plaintiff was the prevailing party. This patent infringement case was an exceptional case under the meaning of the statute and case law because the Defendants willfully and in bad faith refused to

communicate with Plaintiff or his counsel despite numerous attempts to settle this dispute without resort to litigation, because Defendants deliberately evaded service of process requiring multiple visits by the process server until the server was able to successfully serve the Complaint upon Defendants, and because Defendants refused to answer the complaint, participate in litigation, appear at court-ordered hearings or otherwise respond to Plaintiff's attempts to resolve the infringement of Plaintiff's patent in an orderly fashion. 35 U.S.C. §285.

2. The hourly rate charge by the Plaintiff's lead attorney, Rod D. Baker, of Peacock, Myers and Adams. P.C., an Albuquerque law firm specializing in patent law, of \$250.00 an hour is reasonable for the expertise and experience of a patent lawyer in the Albuquerque, New Mexico legal market. The sworn affidavit submitted by the plaintiff's counsel is evidence of market rates. *See Case v. Unified Sch. Dist. No. 233*, 157 F. 3d, 1243, 1256 (10th Cir. 1998).

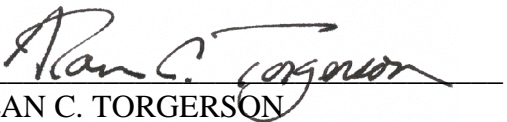
3. Plaintiff has requested an award of \$1729.00 in attorney's fees, or approximately 6.9 hours at \$250 an hour. The attorney's billed hours are presented in a series of five billings dated September 30, 2003, October 31, 2003, February 29, 2004, May 31, 2004, and June 30, 2004. The Court has reviewed these billings and find a small discrepancy in the amount of billed time by Plaintiff's counsel, Mr. Baker, (7. 3 hours not including the .4 hours not charged to the client on June 1, 2004) and the requested fee, but the discrepancy is against the Plaintiff. The Court also notes that the requested attorney's fees do not include any amounts billed for work done by paralegals and the Plaintiff has not requested costs. In addition, an examination of the bills shows that Plaintiff's counsel did not charge .4 hour for legal work done on June 1, 2004 and that the firm of Peacock, Myers and Adams. P.C. wrote off \$100.00 plus tax as a courtesy to the Plaintiff.

4. Accordingly, the Magistrate Judge recommends that an award of attorney's fees be

granted in favor of the Plaintiff, as requested, in the amount of \$1729.00.

NOTIFICATION

THE PARTIES ARE NOTIFIED THAT WITHIN 10 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition, they may file written objections with the Clerk of the United States District Court, 333 Lomas Blvd. NW, Albuquerque, NM 87102, pursuant to 28 U.S.C. §636 (b)(1)(c). A party must file any objections within the ten day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.


ALAN C. TORGERSON
UNITED STATES MAGISTRATE JUDGE